ZULKIFLI BIN ISMAIL

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, SHAH ALAM
DATO' RANITA HUSSEIN JC
[CRIMINAL APPEAL NO. 42-11-92]
8 JULY 1994

CRIMINAL LAW: Rape - Ingredients - Whether proved - Seminal stains on clothes of accused - Whether consistent with allegation of rape - Complainant 16 years of age - Sentence of 7 years imprisonment and three strokes of whipping - Whether adequate.

EVIDENCE: Prosecution produced chemist report but failed to call chemist to give evidence - Whether non-production of chemist amounted to non-production of "evidence which could be produced" - Evidence Act s. 114(g) - Adverse inference - Whether invocable.

EVIDENCE: Charge of rape - Corroboration - Complainant's conduct after alleged rape - Whether capable of corroborating her other evidence - Evidence of relative of complainant - Whether admissible to prove corroboration.

This was an appeal by the appellant, a policeman, against his conviction and the sentence of seven years imprisonment and three strokes of whipping passed against him by the Sessions Judge in respect of an offence of rape. The complainant was a girl of sixteen years of age.

In convicting the appellant, the Sessions Judge ruled that the complainant's conduct immediately after the alleged rape was corroborative of her other evidence in respect of the offence and further, that the complainant's story had also been corroborated by the evidence of her uncle, SP3, who was with the complainant prior to and after the alleged rape. Counsel for the defence submitted that the trial Judge had erred in admitting the aforesaid evidence and also in taking those evidence as being corroborative in their effect. Counsel further submitted that the failure to call the chemist to give evidence afforded sufficient ground for a finding of adverse inference under s. 114(g) Evidence Act 1950, notwithstanding that the report of the said chemist was being tendered by the prosecution.

Before the learned Judicial Commissioner the primary issues that arose were:

(1) Whether the trial Judge's finding that there was corroboration of the complainant's evidence of rape was flawed.

(2) Whether in the circumstances of this case the non-production of the chemist as a witness amounted to non-production of "evidence which could be produced" within the meaning of s. 114(g) Evidence Act 1950.

(3) Whether the sentence imposed by the Sessions Judge was inadequate and ought to be enhanced.

Held:

[1] The trial Judge has not flawed in his findings both at the end of the prosecution case and at the end of the case for the defence. Although the trial Judge had called for the

defence on a finding of a *prima facie* case, there is no doubt that on the totality of the evidence adduced by the prosecution, the trial Judge would still have called for the defence had he used the strict test of "proof beyond reasonable doubt". In addition, the trial Judge's analysis of the evidence was sufficiently detailed and inferences drawn sufficiently reasonable as to warrant a finding that the defence was untrue and did not raise a reasonable doubt.

[2] The finding that the complainant's story was corroborated by her own conduct immediately after the alleged rape is well-founded and fully supported by the facts. The submission of the defence against admissibility of such evidence is untenable as there is nothing in law to prevent the Court from treating evidence of such conduct as admissible to corroborate the complainant's own evidence respecting the alleged offence.

[3] Likewise, the contention of the defence that the evidence of SP3 could not be used to corroborate the complainant's evidence as he was the complainant's uncle and therefore an interested party, is also not tenable. There is neither authority nor principle to support the proposition that the evidence of a witness cannot be corroborated by his or her relative or by any person who may be said to be an interested party.

[4] Adverse inference can only be drawn if there is withholding of evidence but not merely on account of failure to obtain evidence.The non-production of the chemist as a witness can hardly be equated to the non-production of "evidence which could be produced" within the meaning of s. 114(g) Evidence Act 1950. The prosecution has every right to choose who it wishes to call as a prosecution witness. In any case the chemist report was produced and the accused could have called the chemist as his own witness if he wanted to. In the circumstances no adverse inference can be drawn by the failure of the prosecution to produce the chemist.

[5] Bearing in mind that the accused is a member of the police force who had misused his authority, that he did not show any remorse over the crime he committed, that the victim is a young girl of only 16 years of age, the sentence imposed is inadequate and calls for a revision. In exercise of the powers conferred upon this Court by s. 325 read with s. 316 Criminal Procedure Code, the sentence is therefore enhanced to one of ten years imprisonment and three strokes of whipping.

[Appeal dismissed. Sentence enhanced].

Cases referred to:
Liew Kim Young v. PP [1989] 2 CLJ 914/[1989] 3 MLJ 327 ***(foll)***
PP v. Emran bin Nasir [1987] 1 MLJ 166 ***(foll)***
PP v. Foong Chee Cheong [1970] 1 MLJ 97 ***(foll)***
Emperor v. Mahadeo Tatya AIR (29) 1942 Bombay 121 ***(refd)***
Srichand v. State of Maharashtra AIR 1967 SC 450 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 316, 325
Evidence Act 1950, s. 114(g)
Criminal Code, s. 144(g) (India)

For the applicant - Ranjit Singh; M/s. Paramjit & Co.
For the respondent - Zainal Abidin, DPP

JUDGMENT

Ranita Hussein JC:

The accused had been charged and convicted in the Sessions Court, Kuala Kubu Bahru for the offence of the rape of a 16 year old girl on 13 August 1990. He appealed against the conviction and the sentence of 7 years imprisonment and 3 strokes whipping.

The appeal was based on several grounds, the main one being the allegation that there was an absence of material corroboration of the complainant's evidence of rape.

The prosecution's case rested mainly on the evidence of the complainant, SP1 and her uncle, SP3. The gist of their testimony was that they were together on the night of 12 August 1990 when they were confronted by the accused and another person (OKT3). The accused identified himself as a policeman. He led SP1 away from SP3 purportedly for questioning and SP3 remained with OKT3. SP1 and the accused were joined by a third man OKT 2. The accused and OKT2 then took turns to rape SP1. When SP1 was taken back to the place where SP3 was, she informed him of the rape. She later complained of the rape to a police constable, SP5 and was taken to the police station where she made a police report.

The trial Judge found that there was no material contradictions in the evidence of SP1 and SP3. He further found that their demeanour showed them to be truthful witnesses. Certain discrepancies in the evidence of SP1 and SP3 were highlighted by the appellant's Counsel but I am in agreement with the trial Judge in finding that the discrepancies were not material contradictions.

The trial Judge further found that SP1's story was corroborated by her own conduct immediately after the alleged rape. She was crying incessantly; she complained of the rape first to her uncle and then to SP5. The trial Judge relied on the case of *Liew Kim Young v. PP* [1989] 3 MLJ 327 in treating SP1's conduct after the alleged rape as admissible to corroborate her own evidence as to the offence. Recourse may also be had to *PP v. Emran bin Nasir* [1987] 1 MLJ 166 in regarding the evidence of distress of the victim soon after the offence as corroboration.

In the appeal, Counsel for the appellant argued that the evidence of SP3 could not be used to corroborate SP1's evidence as he was an interested witness. Apart from raising innuendos from the fact that SP1 and SP3 had spent the whole day together no clear evidence was adduced by Counsel for the appellant as to how SP3 could be regarded as an interested witness. Even assuming that he could be so regarded, *PP v. Foong Chee Cheong* [1970] 1 MLJ 97 may be taken as authority for allowing SP1's evidence to be corroborated by SP3's evidence. In that case it was held that:

> ...there is neither authority nor principle in support of the proposition that the evidence of a witness cannot be corroborated by his employee or relative or by any person who may be said to be an interested party ..... He is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances.

The trial Judge found SP1 as well as SP3 to be credible witnesses and there is no evidence to the contrary to justify my disturbing his finding as such.

The Counsel for the appellant further argued that there was no evidence of penetration or opinion of such fact by the doctor (SP6) in the medical report or in her oral testimony. According to him, it was not established what caused the "abrasions around the external

hymen'. He noted that no sperm was found on SP1 by the doctor and that the doctor had stated in cross-examination that the abrasion could have been caused by other matters.

I note that in his grounds of decision, the trial Judge had made a positive finding of the fact of penetration from SP1's oral evidence and from the doctor's (SP6) evidence.

In this connection practical guidance may be obtained from the case of *Emperor v. Mahadeo Tatya* AIR (29) 1942 Bombay 121 which established that:

> Where rape is denied by the accused the sort of corroboration one looks for is medical evidence showing injury to the private parts of the complainant, injury to other parts of her body which may have been occasioned in a struggle, seminal stains on her clothes or the clothes of the accused or the places where the offence is alleged to have been committed; and in all cases importance is attached to the subsequent conduct of the complainant.

In the present case, a scrutiny of the medical report revealed the following statements:

> Hymen ragged indicated old tear.
>
> No new tear seen.
>
> Abrasion wound around the external hymen from 3 o'clock to 9 o'clock - pinkish which indicates new lesion with tenderness present.

In respect of the 'old tear' the testimony of SP6 indicated that it could have been caused by previous sexual intercourse. However according to her, there was also a new tender lesion. On this SP6 testified as follows:

> Terdapat some amount brutal sexual intercourse has been committed ... ini berakibat daripada kekerasan. Ia tidak berlaku dalam suatu keadaan biasa.

Although SP6 was, by her own admission, relatively inexperienced in examining rape victims, she did not, during cross-examination, waver in her opinion that, there had been "brutal sexual intercourse" explaining that her opinion was based on the extensive and serious injury to the complainant's private part. SP6's statement "Ia boleh jadi disebabkan oleh perkara lain' which was highlighted by the accused in his appeal, is, to my mind, just an answer on some possible hypothetical cause for the injury prompted by a question in cross-examination. In the light of the doctor's opinion on 'brutal sexual intercourse' it merits no special attention in the absence of any evidence identifying or focusing on a plausible alternative. In the circumstances I find that there was a positive opinion by the doctor of the fact of rape.

The Counsel for the appellant made much of the fact that there were no injuries on the other parts of SP1's body. However, this could well be explained by the fact that SP1 was effectively subdued in the physical sense by the two men who helped each other pin her down during the incident, thus making her ability to struggle rather restricted. Furthermore, her shirt was not take off during the rape and this could explain the absence of any injury on her back although she was lying on the ground.

Additional corroboration of the rape was found from evidence of the presence of seminal stains on SP1's clothes. As for the conduct of the complainant immediately after the rape it is, as described earlier, corroborative of, and at the very least, consistent with the allegation of rape.

During the trial, the chemist report was produced but the chemist was not called as a witness for the prosecution. On appeal, Counsel for the appellant sought to invoke s. 114 illustration (g) of the Evidence Act on account of this failure.

Section 114 (g) states:

> The Court may presume - that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it ...

In my view, the non production of the chemist as a witness can hardly be equated to the non-production of "evidence which could be produced" within the meaning of that provision. The prosecution has every right to choose who it wishes to call as a prosecution witness. In any case, the chemist report was produced and the accused could have called the chemist as his own witness if he had wanted to.

This view can find support in the case of *Srichand v. State of Maharashtra* AIR 1967 SC 450 where the Court considered s. 144 illustration (g) of the Indian Criminal Code, which is in *pari materia* with our provision, and held that adverse inference can be drawn only if there is withholding of evidence and not merely on account of failure to obtain evidence.

Yet another argument forwarded by the Counsel for the appellant was that at the end of the prosecution case, the case against the accused had not been proven beyond reasonable doubt.

My short answer to that is that although in his grounds of decision the trial Judge had stated that he called for the defence after finding that there was a *prima facie* case against the accused, I am quite certain that on the totality of evidence adduced by the prosecution the trial Judge would still have called for the defence had he used the stricter test of 'proof beyond reasonable doubt'.

Having called for the defence, the accused's denial of rape and evidence of the defence witnesses were carefully examined by the trial Judge before he rejected them. It suffices to mention that I found the trial Judge's analysis of the accused's evidence sufficiently detailed and inferences drawn sufficiently reasonable to warrant his finding that the defence was untrue and did not raise a reasonable doubt.

The accused's allegation of an improper identification parade was unsubstantiated by the evidence. The subjects chosen for the parade and procedures followed did not justify the challenge. The accused was, furthermore, positively identified.

In his grounds of judgment the trial Judge expressed his regret over the inadequacy of the sentence that he had passed on the accused, giving the following reasons and leaving it to this Court to consider the matter and to impose a more adequate sentence:

(i) the accused is a member of the police force who had misused his authority;
(ii) there was evidence of collaboration/conspiracy to commit rape between the appellant and another person;
(iii) the accused did not show any remorse;
(iv) the victim was a young girl whose future and marriage prospects have been adversely affected.

Upon hearing submissions by the appellant's Counsel and the Deputy Public Prosecutor on the matter of sentence I am persuaded that the reasons enunciated above call for the imposition of a more severe sentence. Accordingly in exercise of my powers under s. 325 read with s. 316 of the Criminal Procedure Code, I enhanced the sentence of 7 years imprisonment and 3 strokes whipping imposed by the Court below to one of 10 years imprisonment and 3 strokes whipping.